Filed 7/13/20 In re D.S. CA3

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

In re D. S. et al., Persons Coming Under the Juvenile Court Law.	C090287
SAN JOAQUIN COUNTY HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. M. L., Defendant and Appellant.	(Super. Ct. No. STKJVDP2016000208)

Appellant M. L., mother of the minors, appeals from the juvenile court's orders terminating parental rights and freeing the minors for adoption. (Welf. & Inst. Code,[1] §§ 366.26, 395.) She contends the juvenile court's finding that the minors are adoptable

[1] Undesignated statutory references are to the Welfare and Institutions Code.

is not supported by the evidence. She also contends the juvenile court and the San Joaquin County Human Services Agency (Agency) failed to comply with the requirements of the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.). We conditionally reverse and remand the matter for limited proceedings to insure ICWA compliance.

BACKGROUND

In light of the issues raised, we dispense with a detailed factual and procedural background and incorporate additional relevant facts in the Discussion.

A

General Facts And Procedure

On May 4, 2016, the Agency filed a section 300 petition on behalf of seven-year-old D. and three-year-old W. The petition was also filed on behalf of the minors' two siblings, who are not subjects of this appeal. The petition alleged the minors and their siblings came within section 300, subdivisions (b) (failure to protect), (e) (severe physical abuse), (g) (no provision for support), (i) (cruelty), and (j) (abuse of sibling). The minors were detained.

The juvenile court took jurisdiction on June 29, 2016, and at the August 24, 2016, disposition hearing, the court adjudged the minors dependents and ordered them removed from parental custody. Both parents were provided reunification services.

On February 22, 2017, the juvenile court found that mother had been inconsistent in her visits with the minors and reduced her visitation. On March 27, 2017, the juvenile court terminated parents' reunification services, due to their minimal progress and participation.

Throughout the reunification period, the minors received services for behavioral issues. They were initially placed together in a nonadoptive foster home. Despite some ongoing behavioral issues, an adoption assessment was completed and they were deemed adoptable. They were subsequently placed together in a concurrent foster home in

August 2017. The minors bonded with this family, who had expressed an interest in adopting them. However, at no fault of the minors, adoption with that family was not possible and the minors were moved to a new prospective adoptive home in August 2018.

As a result of the minors' close bond with their previous foster family, they were slow in adapting and adjusting to the new placement. They did not understand why they had to leave that home and family, and their negative behaviors escalated. They had previously demonstrated progress in their clinical interventions and both required continued services to address their behavior. The Agency's May 24, 2019, section 366.26 report stated that the prospective adoptive parent was committed to working with the minors and their behavioral issues, and committed to adopting the minors. The report also stated that the minors had a close bond with the new prospective adoptive parent that was continually growing stronger.

No testimony was presented at the August 26, 2019, section 366.26 hearing. The juvenile court found the minors were likely to be adopted and no exceptions to adoption existed. The court terminated parental rights, freeing the minors for adoption.

B

ICWA Compliance Background

A May 4, 2016, declaration signed by the social worker, declared the parents were questioned and neither knew if they have Native American ancestry. At the May 18, 2016 detention hearing, mother said she did not know if she had Native American ancestry but would check with her family. She completed an ICWA-020 form claiming possible Native American ancestry but not listing a tribe. Thereafter, during a June 3, 2016 interview, mother stated her paternal grandmother was "full blood" Native American and her maternal grandmother has Native American heritage from Mississippi, but mother did not know with what tribes either were affiliated.

The ICWA-030 notice, filed with the court on September 21, 2016, contained information for mother, minors' fathers, the minors' maternal grandmother and

grandfather, and the minors' maternal great-grandmother and great-grandfather. This information included the fact that the maternal grandmother resided in Sacramento, but did not provide an address, the deceased maternal grandfather's birth date and date and place of death, the name and city of residence of the maternal great-grandmothers, the state of Mississippi as the birthplace for one of the maternal great-grandmothers, and the names and place of death of the deceased maternal great-grandfathers.

As no tribe affiliation had been provided, the ICWA-030 notice was sent only to the Bureau of Indian Affairs (BIA). The response from the BIA indicated that it did not determine tribal eligibility, nor did it maintain a comprehensive list of persons possessing Indian blood. The response stated that it was the responsibility of the person claiming Indian ancestry to establish a tribal affiliation. As a result of the unspecified tribal affiliation, the BIA determined that the notice contained insufficient or limited information to determine tribal affiliation or support that the minor was an Indian child within the meaning of the ICWA. Subsequently, the Agency's February 16, 2017, status review report stated that the ICWA did not apply. The juvenile court made the finding the ICWA did not apply at the February 22, 2017, hearing.

DISCUSSION

I

Adoptability

Mother contends the orders terminating her parental rights must be reversed because there was insufficient evidence to support the juvenile court's finding that the minors are adoptable. We disagree.

"If the court determines, based on the assessment . . . and any other relevant evidence, by a clear and convincing standard, that it is likely the child will be adopted, the court shall terminate parental rights and order the child placed for adoption." (§ 366.26, subd. (c)(1).) "Although a finding of adoptability must be supported by clear and convincing evidence, it [i.e., the determination that it is likely the child will be

adopted within a reasonable time] is nevertheless a low threshold." (*In re K.B.* (2009) 173 Cal.App.4th 1275, 1292.)

Determination of whether a child is likely to be adopted focuses first upon the characteristics of the child; therefore, a finding of adoptability does not require that the child already be in a prospective adoptive home or that there is "a proposed adoptive parent 'waiting in the wings.' " (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649.) On the other hand, the fact that a prospective adoptive parent has shown interest in adopting a minor is substantial evidence the minor is likely to be adopted within a reasonable time, either by that parent or some other. (*In re J.I.* (2003) 108 Cal.App.4th 903, 911; *In re Lukas B.* (2000) 79 Cal.App.4th 1145, 1154; *Sarah M.*, at p. 1651.)

We review the juvenile court's finding on this issue under the substantial evidence standard, giving it the benefit of every reasonable inference and resolving any evidentiary conflicts in favor of affirming. (*In re I.I.* (2008) 168 Cal.App.4th 857, 869.) That is, we must determine whether the record contains substantial evidence from which the court could find clear and convincing evidence that the child was likely to be adopted within a reasonable time. (*In re B.D.* (2008) 159 Cal.App.4th 1218, 1232.) If so, "[i]t is irrelevant that there may be evidence which would support a contrary conclusion." (*In re K.B.*, *supra*, 173 Cal.App.4th at p. 1292.)

Mother contends that, in light of the minors' emotional and behavioral concerns, adoptability could not be found without a preliminary showing that the prospective adoptive parent could meet their needs, and without the consideration of the degree of bonding between the children and their caregiver and the children's statements on the placement and adoption.

The prospect that the minors may have some continuing behavioral problems does not foreclose a finding of adoptability. (See *In re Jennilee T.* (1992) 3 Cal.App.4th 212, 224-225.) Nor does a finding of adoptability require that the child already be in a

preadoptive home. (§ 366.26, subd. (c)(1).) What is required is the likelihood of adoption within a reasonable time. (*Jennilee T.*, at p. 223.)

While the issue of adoptability usually focuses on the minor, "in some cases a minor who ordinarily might be considered unadoptable due to age, poor physical health, physical disability, or emotional instability is nonetheless likely to be adopted because a prospective adoptive family has been identified as willing to adopt the child." (*In re Sarah M., supra*, 22 Cal.App.4th at p. 1650.) "Where the social worker opines that the minor is likely to be adopted based solely on the existence of a prospective adoptive parent who is willing to adopt the minor, an inquiry may be made into whether there is any legal impediment to adoption by that parent [citations]. In such cases, the existence of one of these legal impediments to adoption is relevant because the legal impediment would preclude the very basis upon which the social worker formed the opinion that the minor is likely to be adopted." (*Ibid*.) The term "specifically adoptable," therefore, denotes a child who but for the existence of a prospective adoptive parent would not be adoptable. The suitability of the prospective adoptive parent is not an issue when the child is generally adoptable; it may be placed in issue when the child is specifically adoptable. This is not such a case.

The minors in this case are 10 and eight years of age, with some difficult behaviors both at school and at home but they both also have positive attributes and not one, but two separate families expressed a desire to adopt them. Both minors are healthy and meeting their developmental milestones. They had also demonstrated the ability to bond with their caregiver.

W., at age eight, was described as a rambunctious child with a jovial and energetic personality, who expounds lots of energy through play. She was still struggling with sexual predatory behaviors and sharing and, accordingly, also struggled to make friends. She tends to hit when she does not get her way and acts aggressively toward D. But there had been a decreased occurrence of fights with peers and she was adapting and adjusting

to her new caregiver and routine. She was also continuing to participate in weekly services to address her oppositional and sexualized behaviors.

Although D., at age 10, could be insolent and argumentative, he was also described as a friendly and engaging child with a calm and loving disposition. He did not require medication management for his behavior and was continuing in his weekly therapeutic services to address his oppositional behaviors and to learn protective capacities to keep him safe from W.'s behaviors.

Mother appears to concede that the minors' previous placement addressed their needs and the minors were bonded to that caregiver. Indeed, she appears to have no qualms with the suitability of that caregiver, who was willing to adopt the minors until circumstances (unrelated to the minors) changed. She merely argues that the current caregiver, who is willing to adopt the minors, has not yet been as effective at deescalating their behaviors. She argues that, until the minors' behaviors deescalate again and there is a sufficient showing of a bond between the minors and this caregiver, the termination of parental rights was premature. Such a showing was not required.

The finding that these minors are adoptable was not based solely on the current caregiver's willingness to adopt. She was, in fact, one of two caregivers who had expressed a willingness to adopt these minors, despite any challenges they may have. Indeed, even if the minors' current challenges are never fully resolved, a finding of adoptability is not erroneous. The fact the Agency found two caregivers willing to adopt the minors, as a sibling group, and despite their behavioral and emotional challenges, is evidence that the minors' behaviors are not so extreme so as to prevent a finding that they are likely to be adopted within a reasonable time, if not by the current caregiver, by another.

However, even if the minors could be found adoptable due only to their current placement, the adoptability finding is supported by the evidence. The prospective adoptive parent here has demonstrated an ongoing commitment to adopting the minors.

She resides in a well-maintained, five-bedroom home that has been assessed for health and safety issues. She has developed a supportive network of family and friends, including a brother who has been cleared and approved by the Agency. She is a retired correctional officer, with the ability to manage crisis situations, and has been cleared for social and criminal history. She has demonstrated flexibility, and the ability and dedication in meeting the minors' emotional, behavioral, developmental, medical, and social needs. She has provided structure and stability in the minors' home environment and has ensured the minors have monthly visits with their siblings, who are placed together in a separate adoptive family home. She understands the legal and financial responsibilities of adoption and is committed to providing the minors a permanent home through adoption. The minors had been living with her for over nine months, have expressed that they like her, are benefitting from the attention and love focused upon them as the only children in the home, and their close bond with the prospective adoptive parent has continued to grow stronger.

While it is not necessary to have a proposed adoptive home or parent " 'waiting in the wings' " in order to find the minors adoptable, one was waiting here. (*In re Lukas B., supra,* 79 Cal.App.4th at p. 1154.) The evidence supports the juvenile court's finding that the minors are likely to be adopted within a reasonable time.

II

ICWA

Mother also contends the orders terminating her parental rights must be reversed because the Agency did not fully comply with the inquiry and notice requirements of the ICWA. Although the Agency did make efforts to gather information from mother to provide to the BIA, we must conditionally reverse and remand the matter for limited proceedings for further ICWA compliance.

The ICWA protects the interests of Indian children and promotes the stability and security of Indian tribes by establishing minimum standards for removal of Indian

children from their families and by permitting tribal participation in dependency proceedings. (See 25 U.S.C. § 1902; *In re Levi U.* (2000) 78 Cal.App.4th 191, 195-196.) A major purpose of the ICWA is to protect "Indian children who are members of or are eligible for membership in an Indian tribe." (25 U.S.C. § 1901(3).) The juvenile court and the Agency have an affirmative duty to inquire at the outset of the proceedings whether a child who is subject to the proceedings is, or may be, an Indian child. (Former Cal. Rules of Court, rule 5.481(a); former § 224.3, subd. (a).)[2]

When the juvenile court knows or has reason to know that a child involved in a dependency proceeding is an Indian child, the ICWA requires that notice of the proceedings be given to any federally recognized Indian tribe of which the child might be a member or eligible for membership. (25 U.S.C. §§ 1903(8), 1912(a); *In re Robert A.* (2007) 147 Cal.App.4th 982, 989.) A mere suggestion of Indian ancestry is sufficient to trigger the notice requirement. (*In re Robert A.*, at p. 989.) Notice requirements are construed strictly. (*Ibid*.)

The ICWA notice must "contain enough information to permit the tribe to conduct a meaningful review of its records to determine the child's eligibility for membership." (*In re Cheyanne F*. (2008) 164 Cal.App.4th 571, 576.) It is essential for the Agency to provide the Indian tribe with as much information as is known about the child's ancestors, especially the one with the alleged Indian heritage. (*In re Louis S.* (2004) 117 Cal.App.4th 622, 631.) Notice must include all of the following information, if known: the child's name, birthplace, and birth date; the name of the tribe in which the

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[2] The Legislature amended several sections of the Welfare and Institutions Code related to the ICWA, effective January 1, 2019. (Assem. Bill No. 3176 (2017-2018 Reg. Sess.).) Hereafter, undesignated statutory references are to the Welfare and Institutions Code sections in effect in 2016 and undesignated rule references are to the California Rules of Court in effect in 2016, except in the Disposition, where those references are to the current codes.

child is enrolled or may be eligible for membership; names and addresses (including former addresses) of the child's parents, grandparents, and great-grandparents, and other identifying information; and a copy of the dependency petition. (25 C.F.R. § 23.11(d)(1)(4) (2015); § 224.2, subd. (a)(5)(A)(D); *In re D.W.* (2011) 193 Cal.App.4th 413, 417; *In re Mary G.* (2007) 151 Cal.App.4th 184, 209.) All this information may not be available, even with inquiry of available relatives, but the agency has an ongoing duty to interview the minor's parents and extended family, if known, concerning the child's membership status or eligibility. (§ 224.3, subds. (a) & (c); Cal. Rules of Court, rule 5.481(a)(4).)

Mother contends the Agency failed to seek additional ancestor identifying and tribal affiliation information from her relatives. The record supports mother's contention. Although the Agency compiled a substantial amount of information for the ICWA forms, a considerable amount of information was missing, even about living relatives, and the Agency's supporting declaration indicates only the parents were questioned. The box provided for identifying other individuals questioned is unchecked. The social worker's subsequent report states that the Agency was still in the process of collecting additional family history to submit to the BIA but no further declarations or information was provided to the court describing who else, if anyone, was interviewed in an attempt to obtain such information. A reasonable construction of the record suggests that the Agency failed to perform further inquiry required by section 224.3, subdivision (c), and therefore to provide the notice information mandated by section 224.2, subdivision (a)(5).

Mother had reported her paternal grandmother was "full blood" Native American and her maternal grandmother has Native American heritage from Mississippi. Mother did not know with what tribes they were affiliated. The ICWA-030 notice indicates both of these grandmothers are alive and living in Stockton and Sacramento, yet former and current addresses, birth dates, and places are omitted. Mother also has, still living, her mother, two paternal half siblings (one of whom had contacted the Agency regarding

placement of the minors), and two maternal half siblings, one of whom lives in Sacramento.[3] Those relatives may have some information about tribal affiliation, current contact information for the maternal great-grandmothers, or other ancestry information. There is no indication in the record that the Agency made any effort to inquire of any of these relatives to obtain the necessary ICWA notice information. If such inquiry was made, the Agency should have documented those facts for the court as part of its request to find that the ICWA did not apply.

In the absence of any information regarding tribal affiliation, the Agency sent the ICWA notice to the BIA, which responded it was unable to determine tribal affiliation based on the limited information provided. Thus, we cannot say that additional ancestry information would not have assisted the BIA. And certainly an identification of tribal affiliation would be relevant in providing proper notice under the ICWA. The Agency is obligated to make an effort to obtain identifying ancestry information from mother's relatives or document its attempts for the court to consider in making its ICWA findings. If additional relevant information is obtainable through these relatives, that information must be provided to the BIA and any identified tribes. Thus, we must conditionally reverse and remand the matter for limited proceedings to insure ICWA compliance.

DISPOSITION

The orders terminating parental rights are reversed conditionally, and the matter is remanded to the juvenile court with directions to order the Agency to further comply with the inquiry and notice provisions of the ICWA. If, after proper and complete inquiry and notice, the minors are found not to be Indian children, the orders terminating parental

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[3] At the time mother was interviewed about her family background, she believed her other maternal half brother was "on the run" as a result of being the suspect in the investigation of the abuse and death of the minors' sibling. He subsequently, through counsel, sought records in the instant matter.

rights shall be reinstated. If, however, the minors are found to be Indian children as defined by the ICWA and the court determines the ICWA applies to this case, the juvenile court is ordered to conduct a new section 366.26 hearing and proceed in accordance with the ICWA, including considering any petition filed to invalidate prior orders. (25 U.S.C. § 1914; § 224, subd. (e).)

/s/
Robie, J.

We concur:

/s/
Raye, P. J.

/s/
Murray, J.